

# SOUTHERN ENVIRONMENTAL LAW CENTER

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***Sent via E-Mail & Federal eRulemaking Portal to: <http://www.regulations.gov>  
Docket No. EPA-HQ-OW-2020-0008***

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**Re: EPA's Approval of a Clean Water Act Section 404 Program is Non-Discretionary for Purposes of Endangered Species Act Section 7 Consultation**

Dear Ms. Hurlb:

The Southern Environmental Law Center ("SELC") submits the following comments on behalf of the undersigned organizations, which work to protect and restore the natural environment in the Southeast. We write in response to the Environmental Protection Agency's ("EPA") request for comment on whether the agency should reconsider its position that consultation under the Endangered Species Act ("ESA") is not required when the EPA approves a state or tribe's request to assume the Clean Water Act ("CWA") Section 404 dredged and fill permit program.

EPA should reconsider its position. EPA's approval of a state's or tribe's assumption of Section 404 permitting responsibilities is discretionary and thus triggers the requirements for consultation under Section 7 of the ESA. We are concerned, however, about how states or tribes would ensure that the ESA's requirements are being applied at the project-specific level. As detailed below, any programmatic consultation of a state's or tribe's assumption of the 404 program must include project-specific ESA evaluations. A state or tribe may not merely undergo consultation at the assumption point and then have no further ESA obligations for future 404 permits the state or tribe issues.

In these comments, we first discuss the Southeastern species and habitats that would be affected by EPA's change in position. Next, we provide an overview of the relevant provisions of the ESA and CWA before turning to how these legal authorities require (1) consultation when a state or tribe assumes 404 permitting responsibilities and (2) further project-specific analyses and assurances when a state or tribe subsequently issues permits that may affect ESA-protected species.

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## I. The Southeastern Resources at Stake

The incredibly biodiverse Southeast<sup>1</sup> stands to be uniquely impacted by any state- or tribe-assumed 404 permitting programs. Our region is home to many species and habitats protected by the ESA. Across the Southeast, there are currently 254 species that receive ESA protections by their classification as endangered (176), threatened (75), or experimental populations (32).<sup>2</sup> These species range from the iconic West Indian manatee to lesser-known mussels that play an important role in preserving the water quality of our region. Invertebrates like mussels and crayfish make up the largest taxonomic group of all Southeastern listed species, with 99 listed species. There are 68 listed plants,<sup>3</sup> 42 listed fishes, 15 listed mammals, 10 listed reptiles, 9 listed birds, 6 listed amphibians, and 5 listed insects in our region alone. The majority of these species (237) are managed by the U.S. Fish and Wildlife Service (“USFWS”), while eight are managed by the National Marine Fisheries Service (“NMFS”), and nine are jointly managed by the two Services. Alabama leads the Southeast region in number of listed species with 145, followed by Tennessee with 101, Georgia with 86, Virginia with 84, North Carolina with 75, and South Carolina with 48. In addition to the 254 Southeastern species already listed under the ESA, 164 additional species in the Southeast are being considered for listing by either USFWS or NMFS.

More than 78 million acres and 23,000 miles of critical habitat<sup>4</sup> have been designated or proposed for designation in the Southeast to protect 87 different species of all taxonomic groups. These designated habitats range from small caves—like the tiny Key Cave in Alabama, which protects the Alabama cavefish—to long stretches of rivers—like the Atlantic Sturgeon’s habitat, which includes dozens of rivers along the Eastern Seaboard.

The biodiverse ecosystems of the Southeast face multiple threats from human activity. Habitat destruction and degradation are the leading causes of species imperilment and extinction, both in the United States and around the world.<sup>5</sup> The impacts of human presence on habitats in the Southeast are becoming increasingly problematic. Eleven of the 20 fastest-growing

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<sup>1</sup> For the purposes of this section, “the Southeast” is defined to include Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee.

<sup>2</sup> For a full list of listed species in the Southeast, see Appendix A. Numbers may not necessarily add up because some species are listed differently based on their geographic range.

<sup>3</sup> Plants are provided a lower level of protection than generally applies to listed species of animals. In particular, while Section 7 consultation requirements still apply to plants, take prohibitions are limited to protection against removal of, or malicious damage to, such plants on federal lands. See 16 U.S.C. § 1536; *id.* § 1538(a)(2). Endangered plants are also protected from commercial trade. See 16 U.S.C. § 1538(a)(2)(C).

<sup>4</sup> Rivers, shoreline, and other linear habitat features are measured in miles, while non-linear habitat features such as lakes and ocean area are measured in acres.

<sup>5</sup> See, e.g., S.L. Pimm et al., *The Biodiversity of Species and Their Rates of Extinction, Distribution, and Protection*, 344 SCIENCE 1246752 (2014); Wilcove, D.S. et al., *Quantifying Threats to Imperiled Species in the United States: Assessing the Relative Importance of Habitat Destruction, Alien Species, Pollution, Overexploitation, and Disease*, 48 BIOSCIENCE 607 (1998).

metropolitan areas in the nation are found in the Southeast.<sup>6</sup> As Southeastern cities expand, urban sprawl is contributing significantly to the fragmentation and destruction of natural habitats.<sup>7</sup> These changes can introduce a host of negative impacts to species, such as by interrupting predator-prey relationships and by diminishing the quality of foraging habitat.

Climate change is predicted to significantly transform a number of habitats in the Southeast in the foreseeable future, introducing additional threats to the already imperiled species and habitats in the region.<sup>8</sup> It is likely that the Southeast will see high levels of biodiversity loss and large species range shifts as a result of these threats. There has been a substantial increase in the severity of Atlantic hurricane activity since the 1980s, and further increases are projected,<sup>9</sup> putting some species, like the red-cockaded woodpecker, at risk of extreme habitat loss.<sup>10</sup> In addition, researchers predict that areas in southwestern portions of the Southeast region may experience drier conditions, while the northeastern areas may experience wetter conditions.<sup>11</sup> Warmer temperatures and drier conditions will also increase the frequency and intensity of wildfires, as well as outbreaks of damaging forest pests such as the hemlock woolly adelgid, both of which can decimate forest ecosystems.<sup>12</sup> Many high-elevation forest species are expected to suffer tremendously from warming temperatures.<sup>13</sup> Coastal species and ecosystems in the Southeast are also threatened by sea level rise—currently as much as two inches per decade and accelerating in some places along our coast—which will erode shorelines, inundate wetlands, and allow saltwater intrusion.<sup>14</sup> By 2030, between 16 and 60 percent of all nesting beach habitat for sea turtles and shorebirds in the Southeast is projected to be more vulnerable to erosion due to sea level rise.<sup>15</sup> Studies have indicated that endangered mammals and birds are particularly affected by the changing climate.<sup>16</sup> In these ways and more, climate

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<sup>6</sup> U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, RELEASE NO. CB15-56, NEW CENSUS BUREAU POPULATION ESTIMATES REVEAL METRO AREAS AND COUNTIES THAT PROPELLED GROWTH IN FLORIDA AND THE NATION (2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-56.html>.

<sup>7</sup> Adam J. Terando et al., *The Southern Megalopolis: Using the Past to Predict the Future of Urban Sprawl in the Southeast U.S.*, 9 PLOS ONE e102261 (2014).

<sup>8</sup> Jennifer Costanza et al., *Assessing Climate-Sensitive Ecosystems in the Southeastern United States*, U.S. GEOLOGICAL SURVEY (USGS) (2016), <https://pubs.er.usgs.gov/publication/ofr20161073>.

<sup>9</sup> See, e.g., Kevin J.E. Walsh et al., *Tropical Cyclones and Climate Change*, 7 WIREs CLIMATE CHANGE 65 (2015).

<sup>10</sup> See, e.g., Steven M. Lohr et al., *Restoration, status, and future of the red-cockaded woodpecker on the Francis Marion National Forest thirteen years after Hurricane Hugo*, in *Red-Cockaded Woodpecker Road to Recovery*, 230 -237 (Ralph Costa & Susan J. Daniels eds., 2004).

<sup>11</sup> Jerry M. Melillo et al., *Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. GLOBAL CHANGE RESEARCH PROGRAM (2014), <https://nca2014.globalchange.gov/report/regions/southeast>.

<sup>12</sup> Lynne M. Carter et al., *Southeast and the Caribbean*, in *CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT*, 396-417 (Jerry M. Melillo et al. eds., 2014).

<sup>13</sup> Mary Lou Hoffacker et al., *Interspecific interactions are conditional on temperature in an Appalachian stream salamander community*, *OECOLOGIA* (2018).

<sup>14</sup> NAT'L OCEANIC AND ATMOSPHERIC ADMIN. (NOAA), *Sea Level Trends* (2018), <https://tidesandcurrents.noaa.gov/sltrends/>.

<sup>15</sup> Betsy von Holle et al., *Effects of future sea level rise on coastal habitat*, *J. WILDLIFE MGMT.* (Feb. 3, 2019).

<sup>16</sup> Michela Pacifici et al., *Species' Traits Influenced Their Response to Recent Climate Change*, 7 NATURE CLIMATE CHANGE 205 (2017).

change will further reduce the availability of suitable habitat for imperiled species in the Southeast.

## **II. Legal Background**

The ESA and the CWA have mutually reinforcing provisions to ensure protections for imperiled species and the habitats upon which they depend. The ESA requires federal agencies to consult with USFWS or NMFS to ensure any discretionary actions are not likely to jeopardize the continued existence of listed species or adversely impact their critical habitat. 16 U.S.C. § 1536(a)(2). In turn, the implementing regulations for Section 404 of the CWA require a variety of analyses and environmentally-protective measures, including specifically incorporating the ESA's language and requirements for ensuring against jeopardy of protected species or harm to protected habitats.

### **A. Section 7 of the Endangered Species Act**

The ESA was passed in 1973 in recognition of the “esthetic, ecological, educational, historical, recreational, and scientific value” of species that development and inadequate conservation measures were threatening or destroying. 16 U.S.C. § 1531(a)(3). The Act's ultimate goal is to achieve recovery of listed species through conservation actions, where “conservation” is defined as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532. This conservation policy permeates the entire ESA statute.

Section 7 of the Act imposes both procedural and substantive obligations on federal agencies. Fundamentally, Section 7 requires federal agencies to ensure that their discretionary actions, including issuance of 404 permits, are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.03. Federal agencies meet these mandates through a requirement to consult with the Services and receive a biological opinion on the effects of their actions.

These obligations are ongoing. If new information shows that a federal action is likely to impact listed species or habitat in a manner or to an extent not previously considered, consultation with the Services must be reinitiated.

Under ESA Section 7(a)(2), federal agencies must consult with the USFWS or NMFS to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). In turn, “jeopardize the continued existence” is defined as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

The “may affect” threshold for triggering the consultation duty under Section 7(a)(2) is low. “Any possible effect, whether beneficial, benign, adverse or of an undetermined character,

triggers the requirement” *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). In analyzing the effects of the agency action, the agencies must consider “all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action.” 50 C.F.R. § 402.02. The analysis must examine not only future agency action, but also “future State or private activities, . . . that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* All of this means that an agency avoids the consultation requirement for a proposed discretionary action *only if* it determines that its action will have no effect on threatened or endangered species or critical habitat. *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 475 (D.C. Cir. 2009) (“If the agency determines that its action will not affect any listed species or critical habitat, . . . then it is not required to consult with NMFS or Fish and Wildlife.”).

If the USFWS or NMFS determines that an action will not jeopardize listed species, but may result in take of such species, the consulting agency must issue an incidental take statement specifying the amount or extent of incidental taking that may occur due to the action. 50 C.F.R. § 402.14(i)(1)(i). An incidental take statement authorizes the action agency to “take” listed species without facing ESA Section 9 liability, as long as the action is in compliance with the terms and conditions of the incidental take statement. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1108 (9th Cir. 2012). The statement must also specify the permissible level of take, meaning the incidental take statement also “serves as a check on the agency’s original decision that the incidental take of listed species resulting from the proposed action will not violate section 7(a)(2) of the ESA.” *Nat. Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1182 (N.D. Cal. 2003).

## **B. Section 404 of the Clean Water Act**

In turn, the CWA imposes certain requirements for projects that impact the “Nation’s Waters.” If a project will require the dredging or filling of material into “waters of the United States,” the agency proposing the project must secure a permit from the U.S. Army Corps of Engineers (“Corps”) under Section 404 of the CWA. In deciding whether to issue a Section 404 permit, the Corps must apply the EPA’s Section 404(b)(1) Guidelines. As required by the CWA, the guidelines specify where and under what conditions dredged or fill material can be discharged lawfully.

The Corps’ 404 Guidelines prohibit issuing a permit for a discharge of dredged or fill material if the discharge (1) “[c]auses or contributes . . . to any violations of any applicable State water quality standard;” (2) “[v]iolates any applicable toxic effluent standard or prohibition under section 307” of the Clean Water Act; (3) would “[j]eopardize[] the continued existence of species listed as endangered or threatened under the Endangered Species Act . . . or result[] in likelihood of the destruction or adverse modification of a habitat which is determined . . . to be a critical habitat under the Endangered Species Act;” (4) “[v]iolates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under the Marine Protection, Research and Sanctuaries Act.” 40 C.F.R. § 230.10(b). Thus, the Corps’ Section 404 Guidelines essentially replicate and reemphasize the ESA mandate to ensure that projects authorized by the Corps comply with Section 7 of the ESA.

The Corps further may not issue a permit where the applicant has not taken appropriate steps to “minimize potential harm to the aquatic ecosystem,” or the Corps does not have “sufficient information” to make a reasonable permit decision. *Id.* § 230.12(a)(3)(iii)-(iv).

### **C. State Assumption of Section 404 Duties**

State and tribal authorities have the option of assuming administration of the CWA Section 404 permitting program from the Federal government for waters within their jurisdiction. 40 C.F.R. § 233 et seq. For a state or tribe to assume this 404 permitting administration, the entity must commit to regulating discharges of all dredged or fill material into all of the waters within the jurisdiction of the state or tribe. *Id.* § 233.1(b). A state or tribe that decides it wants to assume administration of the section 404 program must apply through the procedures set forth under 40 C.F.R. § 233 Subpart C or Subpart F. Before a state’s Section 404 program can be approved, a state must submit a description of the state program (including its permit review criteria), a statement from the state Attorney General that the state laws and regulations provide adequate authority to carry out the program, and a Memoranda of Agreement with both the EPA and the Corps setting out the State and federal responsibilities. *Id.* § 233.10.

Once approved, the state becomes responsible for implementing the 404 permitting program as it would be by the Corps. *See id.* § 233.1. Permits issued by the state must comply with the requirements of the CWA, including the requirements of section 404(b)(1). *Id.*; *id.* § 233.23(a). This includes the requirement that a permit may not be issued that “[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act . . . or results in likelihood of the destruction or adverse modification of . . . critical habitat . . .” 40 C.F.R. § 230.10(b)(3). Furthermore, a permit for any discharge “with reasonable potential for affecting endangered or threatened species as determined by [the USFWS]” cannot be categorically waived and must still be reviewed by the EPA prior to being issued by a State or Tribe. *Id.* § 233.51(b)(2). In sum, any approved State program must be conducted in accordance with all parts of the Clean Water Act—including section 404—and “[w]hile States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.” *Id.* § 233.1(d).

To date, only two states have applied for and been given the authority to assume the burden of administering the 404 permitting program themselves. *See* 40 C.F.R. § 233 Subpart H. Michigan and New Jersey began their section 404 programs in 1984 and 1994, respectively. *Id.* § 233.70; § 233.71. Otherwise, none of the other 48 states, or hundreds of Native American tribes, have elected to assume section 404 responsibility from the Corps.

### **III. State Assumption Could Have Far-Reaching Impacts for the Southeast**

While we believe that a state’s or tribe’s assumption of the CWA Section 404 permitting program triggers ESA Section 7 consultation requirements, we are concerned as to how the state or tribe would fulfill the legal requirements imposed by the ESA and the CWA upon assumption of the section 404 program. Implementing a state-run 404 program in the Southeast, with our hundreds of listed species, would be especially unworkable and could be particularly damaging if not appropriately managed.

### **A. State Assumption Requires Consultation**

Consultation under Section 7 of the ESA applies to “all actions in which there is discretionary federal involvement or control.” 50 C.F.R. § 402.03. In order to trigger Section 7 consultation, the statute must give the agency the authority “to consider the protection of threatened or endangered species . . .” *Nat’l Ass’n of Home Builders vs. Defenders of Wildlife*, 551 U.S. 644, 671 (2007). The *Nat’l Home Builders* case considered whether a state assuming the NPDES permitting program under Section 402 of the CWA triggers ESA consultation. *See id.* at 644. The CWA directs the EPA to approve a state’s NPDES program so long as nine criteria are met. 33 U.S.C. § 1342(b). The Court held that because the agency *must* approve the transfer if all nine criteria are met, there is no discretionary action that triggers Section 7 consultation, and the EPA has no authority to add another criteria (protection of endangered and threatened species) to the list. *Nat’l Ass’n of Home Builders*, 551 U.S. at 671.

A state’s or tribe’s assumption of the dredge and fill permitting program under Section 404 of the CWA is materially different from an assumption of the NPDES program. In contrast to Section 402 of the CWA, Section 404 provides EPA with discretion in approving assumption. In the 404 context, EPA makes its determination “whether such State has the following authority with respect to the issuance of permits pursuant to such program” after “taking into account any comments submitted by [the Corps] and . . . the Fish and Wildlife Service.” 33 U.S.C. § 1344(h)(1). In turn, the applicable regulations provide that EPA “shall approve or disapprove the program based on whether the State’s program fulfills the requirements of this part and the Act, taking into consideration all comments received.” 40 C.F.R. § 233.15(g). Such determination is inherently discretionary. Additionally, in evaluating a state’s request to assume the 404 program, the EPA must determine whether the state’s assumption would comply with the 404 Guidelines—which in turn, as discussed above, incorporate the ESA’s Section 7 consultation requirements. Therefore, EPA’s determination of whether to allow a state or tribe to assume Section 404 permitting responsibilities is a discretionary act triggering consultation under the ESA. Consistent with the ESA, EPA should change its position so as to require consultation when a state or tribe applies to assume the 404 permitting program.

### **B. States Must Still Adhere to ESA Requirements in Administering the Program**

Although Section 7 consultation must be completed when a state or tribe assumes 404 permitting responsibilities, this cannot be the only point at which agencies ensure against jeopardy to listed species or harm to critical habitat for projects permitted under the assumed 404 program.

Yet, by way of example, Florida’s Department of Environmental Protection appears to be seeking to assume the 404 permitting program in order to be friendlier to development interests. In docket materials associated with EPA’s instant call for comments, Florida advocates for EPA to “engage in a *one-time* ESA Section 7 programmatic consultation with the Services in connection with the *initial* review of a state’s 404 assumption application” resulting in a programmatic biological opinion and programmatic incidental take statement which would identify “procedural requirements for state 404 permits.” FDEP Summary Paper at 1; FDEP White Paper at 1-2.

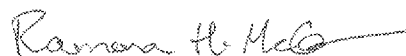
The ESA and CWA requirements outlined above, *e.g.* 16 U.S.C. § 1536(a)(2), 50 C.F.R. 402.02, 40 C.F.R. § 230.10(b), make clear that a state or tribe cannot skirt permit-specific ESA evaluations when assuming the 404 permitting program from the Corps. A state “may not impose less stringent requirements for any purpose” in implementing its own 404 program, 40 C.F.R. § 233.1(d), which includes the substantive duty of ensuring that no permits are issued that would jeopardize the continued existence of listed species or result in likely destruction or adverse modification of critical habitat, *id.* C.F.R. § 230.10(b)(3). States or tribes would be responsible for completing these analyses and meeting these requirements.

As a practical matter, a single overarching consultation completed when a state assumes a program—and corresponding incidental take statement—could not possibly foresee every future impact to every listed species. As noted above, our Southeastern states are home to a cumulative 254 listed species, with anywhere from 48 to 145 species within each state. Assessing any possible future impacts to all of these species at the point of program assumption is impossible. These southeastern species’ habitats, population sizes, and distributions are rapidly changing due to pressures from urban growth and the various impacts of climate change—including sea level rise, increased flooding, marsh migration, and more frequent and severe storms—among other threats. A single programmatic consultation when a state or tribe assumes 404 permitting responsibilities could not accurately determine whether a future-issued permit would jeopardize listed species or adversely modify their habitat.

#### **IV. Conclusion**

We appreciate the opportunity to comment on EPA changing its position regarding whether ESA Section 7 consultation is required when a state or tribe assumes the CWA section 404 permitting program. EPA should change its position and require consultation at the assumption stage, but such an overarching programmatic consultation will not satisfy the requirements to ensure individual permits do not jeopardize listed species or harm critical habitat. Both practical considerations and the law require much more than a single programmatic consultation when a state or tribe assumes the section 404 permitting program. Just as the Corps is required to integrate the ESA’s requirements as it issues each individual 404 permit, a state or tribe would have to do the same.

Sincerely,



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